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Kerajaan Malaysia v KCSB Konsortium Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-21C-3-04 OF 2017
LEE SWEE SENG J
29 MARCH 2019

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Contract — Building contract — Breach — Breach of privatisation agreement — Plaintiff and defendant entered into agreement for design and construction of uncompleted army camp — Whether plaintiff and defendant had breached contract — Whether termination of contract by plaintiff valid and lawful — Whether plaintiff had proved damages for breach of contract

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Limitation — Striking out action on ground of time bar — Strike out plaintiff's claim — Whether plaintiff's action barred by limitation

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This was a case of a privatisation agreement that went wrong of an Army Camp in Skudai that remained uncompleted after 13 over years. The cause of such an unprecedented failure would be unraveled complete with the indecisiveness of the plaintiff and the persistence of the defendant in hoping against hope both combining to prolong the hemorrhage of the project. The plaintiff was the government of Malaysia. It transferred two pieces of land ('the exchanged lands') in Plentong and Tebrau to the defendant for a value agreed at RM256m.

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In exchange the defendant was required to design, construct and build an Army Camp in Skudai in the project land within a three year period from the commencement date of the agreement. The agreement was dated 10 July 1997 and the commencement date was 10 June 1998 and completion was scheduled

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on 10 June 2001. The tripartite privatisation agreement ('the contract') was between the plaintiff, Syarikat Tanah dan Harta Sdn Bhd and the defendant for the design and construction of the Skudai Army Camp ('the project'). In consideration of the defendant completing the project, the plaintiff at the outset of the contract transferred the two pieces of the exchanged lands in Lot

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No 1876 Mukim Plentong, Daerah Johor Bahru, Johor and in Lot No 139 Mukim Tebrau Daerah Johor Bahru, Johor to the defendant. As required under the contract, the defendant duly furnished a land bond of RM256m and a performance bond of RM12.8m. On 17 June 1998, the plaintiff instructed the defendant to stop works. The defendant stopped work on the project in

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December 2002. It became obvious that the defendant had some serious financial problems. The first sign of serious financial problem was when the defendant failed to renew the performance bond which expired on 24 October 2000. The defendant again failed to renew the land bond which expired on 9 June 2002. The bonds were to be kept alive until the completion of the

project. With no security in the bonds equivalent to the value of the exchanged lands already transferred to the defendant for which the plaintiff could not get back, there was only the sure loss if the project could not be completed at all. On 17 August 2004, the parties agreed that the works at the project was revalued and the land bond was reduced based on the balance work to be completed. The value of the project was correspondingly reduced but the defendant still could not continue with the balance work. With no further financing forthcoming, the project was bound to fail. On 7 October 2005 at a meeting between the parties, the defendant disclosed that they lacked the financial resource to recommence work that they had stopped. The plaintiff then issued a default notice dated 4 March 2011 and a termination notice dated 11 April 2011 with the effective date of termination on 10 May 2011. There was a consent judgment recorded in a previous suit for the same reliefs brought by the plaintiff against the defendant which provided for certain timelines for the defendant to fulfill certain conditions in relation to the exchanged lands. Upon fulfillment of those conditions, the defendant would then oblige to make certain payments to the plaintiff. In the event that those conditions were not complied, the parties were at liberty to initiate a fresh action based on the privatisation agreement. The issues were: (a) whether the defendant had breached the contract; (b) whether the plaintiff had breached the contract such that the termination of the contract was unlawful; (c) whether the termination of contract by the plaintiff was valid and lawful; (d) whether the plaintiff had proved the damages from the breach of contract; and (e) whether the plaintiff's claim was barred by limitation.

Held, allowing the plaintiff's claim and dismissing the defendant's counterclaim with costs of RM80,000:

- (1) It could not be disputed that the performance bond procured by the defendant expired on 24 October 2000 and the land bond expired on 9 June 2002 in spite of repeated reminders to renew both. A failure to renew the performance bond and the land bond was both a breach of the contract. As the exchanged land had been transferred to the defendant, it was only natural for the plaintiff to require the land bond for the value of the project to be furnished. Otherwise, there would be no security should the defendant decided not to complete the project or for some reasons the project could not be completed on time. As was in the norm in the construction industry, if there was a breach by the contractor to complete the project in failing to proceed regularly and diligently, the employer may terminate the contract and called upon the bond. There was no problem for the defendant to let out the buildings on the exchanged lands and indeed the defendant was collecting rental from the buildings on the exchanged lands. It remained the obligation of the defendant to raise the necessary financing to commence and continue to completion the

- A project. The court was satisfied that the defendant had breached the contract for the reasons given above (see paras 24–25, 27, 31–32 & 38).
- (2) There was no merit in the argument of the defendant that the plaintiff's contractual obligations included that the exchanged lands transferred to the defendant must have the category of building in their titles. It went without saying that only the registered owner of the land could apply to the state authority for any changes in the conditions and category of land use. There were existing buildings on the exchanged lands which the defendant had let out to tenants upon becoming registered proprietor of the exchanged lands. There was of course the strategic advantage of the exchanged lands in their name as by then no one could prevent them from exercising their rights as a registered proprietor of the exchanged lands which included letting, leasing, charging and transfer of the exchanged lands. There was no prohibition against constructing building on lands which category of land used stated was nil. There was no evidence adduced that the defendant had applied for change of category of land use from nil to building. The fact that the defendant had accepted the transfer of the exchanged lands before the change of category of land use would mean that the defendant had waived the contractual requirement for it was outside the hands of the plaintiff once the exchanged lands were in the name of the defendant (see paras 40–48).
- (3) The defendant had repeatedly applied for a second extension of time to complete the project and the plaintiff had no objection to the defendant continuing to completion provided always the defendant procured a fresh land bond as required under the contract. The defendant failed to do so. From 2006–2011, there was no work done at the site. The termination notice was only issued after the expiry of the default notice giving the defendant a 30 day period to remedy the breach. The termination notice whilst issued on 11 April 2011 was only made effective on 10 May 2011. There was nothing wrong with the default notice and the termination notice, both of which had been validly and lawfully issued under the contract. The termination of the contract by the plaintiff on 10 May 2011 was valid and lawful (see paras 69, 72 & 74–75).
- (4) In respect of damages, the starting point must be the loss of the exchanged lands and parties confirmed that the value should be the reduced sum of RM239,050,549.29. After deducting the completed works amounting to RM45,347,933, the loss suffered by the plaintiff which the plaintiff had proved was RM193,702,616.24. Further, the court found that the liquidated and ascertained damages ('the LAD') claim was a genuine pre-estimate of the loss for the number of days of delay and in any event it would come within the excepted category of cases where it was difficult to assess loss as there was no known measure of

damages employable, the stipulated sum might be recoverable. The LAD shall be calculated from the date of service of the certificate of non-completion up to the date of termination which totaling up to RM75,800,369.90. This LAD shall be added to RM193,702,616.24 thus giving the sum of RM269,502,986.14 (see paras 76–77, 81 & 92).

- (5) There was no merit in the defendant's contention that the plaintiff's claim was barred by limitation. The defendant had contended that the court should take the cause of action as having arisen from the date of extended completion on 16 January 2003. If that was the case, limitation would have set it on 16 January 2009 and both the plaintiff's claim and the defendant's counterclaim would have been statute-barred. It certainly did not make sense for counsel to mount an argument that would defeat and destroy the client's counterclaim completely. To put it euphemistically, it was more a strategy to avoid further losses seeing that the exchanged lands sat snugly and solidly with the defendant as their registered owner and that they would in all probability had appreciated in value. Even though the exchanged lands was compulsorily acquired, the defendant would surely relied on the principle of fair compensation for land compulsorily acquired (see paras 105 & 108).

[Bahasa Malaysia summary]

Ini adalah kes perjanjian penswastan yang bermasalah tentang Kem Tentera di Skudai yang masih belum selesai selepas 13 tahun. Punca kegagalan yang tidak pernah berlaku sebelum ini akan dibongkar lengkap dengan keraguan plaintiff dan kegigihan defendan dengan harapan kedua-duanya bergabung untuk memanjangkan kerugian projek. Plaintiff adalah kerajaan Malaysia. Ia memindahkan dua bidang tanah ('tanah yang ditukar') di Plentong dan Tebrau kepada defendan untuk nilai yang dipersetujui pada RM256 juta. Sebagai pertukaran defendan dikehendaki merancang, membina dan membina Kem Tentera di Skudai di tanah projek dalam tempoh tiga tahun dari tarikh permulaan perjanjian. Perjanjian tersebut bertarikh 10 Julai 1997 dan tarikh mula berkuatkuasa pada 10 Jun 1998 dan penyempurnaan dijadualkan pada 10 Jun 2001. Perjanjian penswastan tiga pihak ('kontrak') antara plaintiff, Syarikat Tanah dan Harta Sdn Bhd dan defendan untuk reka bentuk dan pembinaan Kem Tentera Skudai ('projek'). Sebagai pertimbangan defendan menyelesaikan projek tersebut, plaintiff pada permulaan kontrak memindahkan kedua-dua tanah yang ditukar di Lot No 1876 Mukim Plentong, Daerah Johor Bahru, Johor dan Lot No 139 Mukim Tebrau Daerah Johor Bahru, Johor kepada defendan. Seperti yang dikehendaki di bawah kontrak tersebut, defendan telah menyerahkan satu bon tanah sebanyak RM256 juta dan bon pelaksanaan sebanyak RM12.8 juta. Pada 17 Jun 1998, plaintiff mengarahkan defendan menghentikan kerja-kerja. Defendan berhenti bekerja pada projek tersebut pada bulan Disember 2002. Ia menjadi jelas bahawa defendan mempunyai beberapa masalah kewangan yang serius. Tanda

- A pertama masalah kewangan yang serius adalah apabila defendan gagal memperbaharui bon pelaksanaan yang tamat pada 24 Oktober 2000. Defendan sekali lagi gagal memperbaharui bon tanah yang berakhir pada 9 Jun 2002. Bon tersebut akan terus wujud sehingga projek selesai. Dengan tiada jaminan dalam bon yang bersamaan dengan nilai tanah yang telah ditukar
- B telah dipindahkan kepada defendan yang mana plaintif tidak dapat kembali, hanya ada kerugian pasti jika projek tersebut tidak dapat diselesaikan sama sekali. Pada 17 Ogos 2004, pihak-pihak bersetuju bahawa kerja-kerja di projek tersebut dinilai semula dan bon tanah dikurangkan berdasarkan lebihan kerja-kerja yang akan diselesaikan. Nilai projek tersebut juga dikurangkan
- C tetapi defendan masih tidak dapat meneruskan lebihan kerja. Tanpa pembiayaan selanjutnya yang akan datang, projek tersebut pasti gagal. Pada 7 Oktober 2005 di mesyuarat antara pihak-pihak, defendan mendedahkan bahawa mereka tidak mempunyai sumber kewangan untuk memulakan semula kerja yang mereka telah hentikan. Plaintif kemudiannya mengeluarkan
- D notis ingkar bertarikh 4 Mac 2011 dan notis penamatan bertarikh 11 April 2011 dengan tarikh penamatan efektif pada 10 Mei 2011. Terdapat penghakiman persetujuan yang direkodkan dalam guaman terdahulu untuk relif yang sama yang dibawa oleh plaintif terhadap defendan yang
- E menyediakan garis masa tertentu bagi defendan untuk memenuhi syarat-syarat tertentu berhubung dengan tanah yang ditukar. Setelah memenuhi syarat-syarat tersebut, defendan akan diwajibkan untuk membuat pembayaran tertentu kepada plaintif. Sekiranya syarat-syarat tersebut tidak dipatuhi, pihak-pihak bebas untuk memulakan tindakan baru berdasarkan perjanjian penswastaan. Isu-isu adalah: (a) sama ada defendan telah melanggar kontrak;
- F (b) sama ada plaintif telah melanggar kontrak dengan penamatan kontrak tersebut menyalahi undang-undang; (c) sama ada penamatan kontrak oleh plaintif adalah sah; (d) sama ada plaintif telah membuktikan kerugian daripada pelanggaran kontrak; dan (e) sama ada tuntutan plaintif telah dihalang had masa.
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Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan dengan kos RM80,000:

- H (1) Tidak dapat dipertikaikan bahawa bon pelaksanaan yang diperoleh oleh defendan telah tamat tempoh pada 24 Oktober 2000 dan bon tanah tamat pada 9 Jun 2002 walaupun peringatan berulang untuk memperbaharui keduanya. Kegagalan memperbaharui bon pelaksanaan dan bon tanah adalah pelanggaran kontrak. Memandangkan tanah yang ditukar telah dipindahkan kepada defendan, adalah biasa untuk plaintif
- I untuk menghendaki bon tanah untuk nilai projek yang akan diberikan. Jika tidak, tiada jaminan sekiranya defendan memutuskan untuk tidak melengkapkan projek tersebut atau atas sebab tertentu projek tersebut tidak dapat diselesaikan tepat pada waktunya. Seperti dalam kebiasaan dalam industri pembinaan, jika terdapat pelanggaran oleh kontraktor

- untuk menyelesaikan projek tersebut apabila gagal meneruskan secara tetap dan tekun, majikan boleh menamatkan kontrak dan memanggil bon tersebut. Tiada masalah bagi defendan untuk menyewakan bangunan di tanah yang ditukar dan sesungguhnya defendan sedang mengutip sewa dari bangunan di tanah yang ditukar. Ia tetap menjadi tanggungjawab defendan untuk menaikkan pembiayaan yang diperlukan untuk memulakan dan terus menyiapkan projek. Mahkamah berpuas hati bahawa defendan telah melanggar kontrak atas alasan yang diberikan di atas (lihat perenggan 24–25, 27, 31–32 & 38).
- (2) Tiada merit dalam hujah defendan bahawa kewajipan kontrak plaintif termasuk tanah yang ditukar dipindahkan kepada defendan mesti mempunyai kategori bangunan dalam hakmilik mereka. Adalah nyata bahawa hanya pemilik berdaftar tanah tersebut boleh memohon kepada pihak berkuasa negeri untuk sebarang perubahan dalam syarat dan kategori penggunaan tanah. Terdapat bangunan sedia ada di tanah-tanah yang ditukar yang defendan telah sewakan kepada penyewa apabila menjadi tuan punya berdaftar tanah yang ditukar. Sudah tentu kelebihan strategik tanah yang ditukar dengan nama mereka pada masa itu tidak ada yang dapat menghalang mereka daripada menjalankan hak mereka sebagai tuan berdaftar tanah yang ditukar yang termasuk menyewakan, memajak, mencagar dan memindahkan tanah yang ditukar. Tiada larangan terhadap pembinaan bangunan di atas tanah yang kategori tanah yang digunakan tidak dinyatakan. Tiada keterangan yang menyatakan bahawa defendan telah memohon untuk menukar kategori penggunaan tanah dari tidak dinyatakan kepada bangunan. Hakikat bahawa defendan telah menerima pemindahan tanah yang ditukar sebelum perubahan kategori penggunaan tanah bermakna bahawa defendan telah mengetepikan syarat kontrak tersebut kerana ia berada di luar tangan plaintif setelah tanah yang ditukar tersebut adalah atas nama defendan (lihat perenggan 40–48).
- (3) Defendan telah berkali-kali memohon untuk lanjutan masa kedua untuk menyiapkan projek tersebut dan plaintif tidak mempunyai bantahan kepada defendan untuk meneruskan penyediaan dengan syarat sentiasa defendan memperoleh bon tanah baru sebagaimana yang dikehendaki di bawah kontrak. Defendan gagal berbuat demikian. Dari tahun 2006–2011, tiada kerja yang dilakukan di tapak tersebut. Notis penamatan hanya dikeluarkan setelah tamatnya notis ingkar yang memberi defendan suatu tempoh 30 hari untuk membaiki pelanggaran tersebut. Notis penamatan yang dikeluarkan pada 11 April 2011 hanya dijadikan efektif pada 10 Mei 2011. Tidak ada yang salah dengan notis ingkar dan notis penamatan, yang kedua-duanya telah sah dikeluarkan di bawah kontrak. Penamatan kontrak oleh plaintif pada 10 Mei 2011 adalah sah (lihat perenggan 69, 72 & 74–75).
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- A (4) Bagi ganti rugi, titik permulaan mestilah kehilangan tanah yang ditukar dan pihak-pihak mengesahkan bahawa nilai tersebut hendaklah dikurangkan jumlahnya sebanyak RM239,050,549.29. Selepas menolak kerja-kerja yang lengkap berjumlah RM45,347,933, kerugian yang ditanggung oleh plaintif yang telah dibuktikan plaintif adalah
- B RM193,702,616.24. Selanjutnya, mahkamah mendapati bahawa tuntutan ganti rugi jumlah tertentu dan ditentukan ('LAD') adalah pra-anggaran sebenar kerugian bagi bilangan hari kelewatan dan dalam apa keadaan sekalipun ia akan datang dalam kategori terkecuali kes-kes di
- C mana ia adalah sukar untuk menilai kerugian kerana tidak ada ukuran kerugian kerosakan yang boleh digunakan, jumlah yang ditetapkan boleh dipulihkan. LAD hendaklah dikira dari tarikh penyampaian sijil tidak lengkap sehingga tarikh penamatan yang berjumlah sehingga RM75,800,369.90. LAD ini akan ditambah kepada
- D RM193,702,616.24 dengan itu memberikan jumlah sebanyak RM269,502,986.14 (lihat perenggan 76–77, 81 & 92).
- (5) Tiada merit dalam pertikaian defendan bahawa tuntutan plaintif telah dihalang had masa. Defendan telah menegaskan bahawa mahkamah harus mengambil kausa tindakan yang timbul dari tarikh penyiapan
- E lanjutan pada 16 Januari 2003. Sekiranya itu berlaku, had masa akan ditetapkan pada 16 Januari 2009 dan kedua-dua tuntutan plaintif dan tuntutan balas defendan akan dihalang. Pasti tidak masuk akal untuk peguam untuk mengemukakan hujah yang akan mengalahkan dan memusnahkan tuntutan balas klien sepenuhnya. Untuk meletakkannya
- F secara kiasan, ia adalah lebih kepada strategi untuk mengelakkan kerugian selanjutnya kerana tanah yang ditukar milik kukuh defendan sebagai pemilik berdaftar dan ia dalam kemungkinan meningkat dalam nilai. Walaupun tanah yang ditukar diambil alih secara wajib, defendan pasti akan bergantung kepada prinsip pampasan yang adil untuk tanah
- G yang diambil alih secara wajib (lihat perenggan 105 & 108).]

Notes

For a case on strike out plaintiff's claim, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) para 2734.

- H For cases on breach, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4172–4214.

Cases referred to

- I *Cubic Electronics Sdn Bhd v Mars Telecommunications Sdn Bhd* [2018] MLJU 1935, FC (refd)
Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 MLJ 445, FC (refd)
Kerajaan Malaysia (Jabatan Kerja Raya) v Global Globe (M) Sdn Bhd [2019] 1 MLJ 281; [2018] 1 LNS 1251, CA (refd)

Kerajaan Malaysia v KCSB Konsortium Sdn Bhd [2017] MLJU 2048, HC (refd) **A**

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (refd)

Legislation referred to **B**

Contracts Act 1950 s 75

Land Acquisition Act 1960

National Land Code ss 53(3), 116, 124(1)(a), (1)(c), 320(1)(b)(i)

Rusita bt Md Lazim (Ruzanna bt Razali with her) (Federal counsel, Attorney General's Chambers) for the plaintiff. **C**

Norazmi bin Norazman (Jasneeta Bhullar and Wan Zafran bin Pawancheek Marican with him) (Azmi Fadzly Maha & Sim) for the defendant.

Lee Swee Seng J: **D**

[1] This is a case of a privatisation agreement that went wrong; an Army Camp in Skudai that remained uncompleted after 13 over years. The cause of such an unprecedented failure would be unraveled complete with the indecisiveness of the plaintiff and the persistence of the defendant in hoping against hope both combining to prolong the hemorrhage of the project. **E**

[2] The plaintiff is the Government of Malaysia. It transferred two pieces of land ('the exchanged lands') in Plentong and Tebrau to the defendant KCSB Konsortium Sdn Bhd ('KCSB') for a value agreed at RM256m. In exchange the defendant was required to design, construct and build an Army Camp in Skudai in the project land within a three-year period from the commencement date of the agreement. **F**

PROJECT **G**

[3] The agreement was dated 10 July 1997 and the commencement date was 10 June 1998 and completion was scheduled to be 10 June 2001. **H**

[4] The tripartite privatisation agreement ('contract') was between the plaintiff, Syarikat Tanah dan Harta Sdn Bhd and the defendant for 'The Design and Construction of the Skudai Army Camp' ('the project'). In consideration of the defendant completing the project the plaintiff at the outset of the contract transferred the two pieces of exchanged lands in Lot No 1876 Mukim Plentong, Daerah Johor Bahru, Johor and in Lot No 139 Mukim Tebrau, Daerah Johor Bahru, Johor, to the defendant. **I**

A [5] As required under the contract the defendant duly furnished a land bond of RM256m and a performance bond of RM12.8m. The defendant commenced construction works at the site on 10 October 1997.

B [6] On 17 June 1998 the plaintiff instructed the defendant to stop works for reasons that shall be dealt later in this judgment. Work was recommenced on 17 January 2000 at the instruction of the plaintiff with an extension of time ('EOT') for three years with a new completion date on 16 January 2003.

PROBLEMS

C [7] However the defendant stopped work on the project in December 2002. It became obvious that the defendant had some serious financial problems. The physical progress of the works was certified at 18.27% leaving behind an astounding and alarming 81.73% of the balance work for the project based on 100% completion by January 2003.

D [8] The first sign of serious financial problem was when the defendant failed to renew the performance bond which expired on 24 October 2000 in spite of reminders by the plaintiff including via its letter of 9 October 2000.

E [9] Next the defendant again failed to renew the land bond which expired on 9 June 2002 in spite of repeated reminders including the letter of reminder of 23 April 2002.

F [10] The bonds were there to be kept alive until the completion of the project. It was clearly a breach of the contract justifying termination. However the defendant pleaded with the plaintiff and persuaded it not to terminate the contract. Whoever was in charged of safeguarding the plaintiff's interest was clearly not acting consistent with that duty reposed on him.

G [11] With no security in the bonds equivalent to the value of the exchanged lands already transferred to the defendant for which the plaintiff cannot get back, there was only the sure loss if the project cannot be completed at all.

H [12] If there is some saving grace it was that a registrar's caveat was entered on 26 June 2003 against the exchanged lands to protect the interest of the plaintiff. Whilst it has the effect of preventing further dealings on the exchanged lands without the consent of the plaintiff, the truth of the matter was that the exchanged lands had been charged to the hilt for loans to construct the army camp and in the event of any default, the chargee bank would have first priority.

I [13] The work came to a complete standstill from 2003 to the termination of the contract on 10 May 2011. In between there were endless rounds of

meetings and negotiations with the reality staring at the parties that it was a case of hoping against hope and in the meanwhile the bleeding continued leading to a point beyond rescue and resuscitation.

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[14] It was a crisis that required of the plaintiff the leadership to make tough decision. Someone must bite the bullet! The defendant, on the other hand, with dogged determination, was keen to persevere and their prowess in negotiations bore some fruits. On 17 August 2004 the parties agreed that the works at the project be revalued and the land bond be reduced to RM239,050,549.24 based on the balance work to be completed. The value of the project was correspondingly reduced to RM239,050,549.24.

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[15] Be that as it may, the defendant still could not continue with the balance work. From then till the termination of the contract on 10 May 2011, the many meetings only manifested a malingering malaise — there was clearly a cash problem and more time was pleaded and more time was provided for the defendant to source for financing of the project.

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[16] There is no denying that one must distinguish between being positive and being realistic; the courage to change the things we cannot accept, the grace to accept the things we cannot change and the wisdom to discern one from the other.

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[17] Reality for the defendant unfortunately set in rather late in the day. With no further financing forthcoming, the project was bound to fail. On 7 October 2005 at a meeting between the parties, the defendant disclosed that they lacked the financial recourses to recommence work that they had stopped.

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[18] Reality having sunk in, the plaintiff issued a default notice dated 4 March 2011 and this was followed up with a termination notice dated 11 April 2011 with the effective date of termination on 10 May 2011. There was a consent judgment dated 17 May 2016 recorded in a previous suit for the same reliefs brought by the plaintiff against the defendant. Consent judgment provides for certain timelines for the defendant to fulfill certain conditions in relation to the exchanged lands.

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[19] Upon fulfillment of those conditions, the defendant would then become oblige to make certain payments to the plaintiff. In the event that those conditions are not complied, parties are at liberty to initiate a fresh action based on the privatisation agreement.

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- A** [20] The consent judgment also provides that in the event that a fresh action is commenced, parties will not raise any issue on limitation specifically from the period of termination ie 11 April 2011 and/or 28 April 2011–17 June 2017.
- B** [21] However the defendant could not comply with some of the terms as the exchanged lands were subsequently acquired by the Johor State Government under the Land Acquisition Act 1960.
- C** PRAYERS
- [22] The plaintiff's claim against the defendant is for the following:
- (a) the land bond sum of RM256m;
 - D** (b) the performance bond sum of RM12.8m;
 - (c) the difference between the market value of the land and the land bond as at 30 May 2015 of RM37.4m;
 - (d) the cost of maintenance of buildings, family quarters and army camps of
 - E** RM9,493,807;
 - (e) costs of building new army camps and temporary units of RM1.016 billion;
 - (f) liquidated and ascertained damages (LAD) of RM149,128,228.92 from
 - F** 17 January 2003–10 May 2011;
 - (g) interest at the rate of 8%pa for pre-judgment sum and interest at 5%pa for post judgment sum;
 - (h) costs; and
 - G** (i) such further and other reliefs.
- [23] The defendant in turn counterclaimed for damages for the plaintiff's breach of the contract to the tune of over RM9 billion, far in excess of the plaintiff's claim in that:
- H** (a) the exchanged lands transferred was not for 99 years;
 - (b) the category of land use was not 'Building' but 'Nil' instead;
 - I** (c) there was a shortfall in the size of the exchanged lands transferred by 37.0185 acres out of the 382.156 acres; and
 - (d) a registrar's caveat was entered against exchanged lands transferred and so the exchanged lands were not free from encumbrances.

PRINCIPLES

A

Whether the defendant had breached the contract in failing to renew the performance bond and the land bond and in failing to complete the construction of the project by the extended completion date of 16 January 2003

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[24] It cannot be disputed that the performance bond procured by the defendant expired on 24 October 2000 and that the land bond expired on 9 June 2002 in spite of repeated reminders to renew both.

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[25] A failure to renew the performance bond and the land bond is both a breach of section 11.2(d) and section 7.2(e) of the contract. Section 11.2(d) of the contract provides as follows:

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If a Performance Bond is to expire, a replacement Performance Bond shall be issued to the Government on or prior to the date of expiry of the first mentioned Performance Bond for an amount equal to the amount of the expiring Performance Bond.

[26] Section 7.2(e) of the contract reads as follows:

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If the Land Bond is to expire, a replacement Land Bond shall be issued on or prior to the date of expiry of the first mentioned Land Bond for an amount equal to the amount of the expiring Land Bond.

[27] As the exchanged lands had been transferred to the defendant it was only natural for the plaintiff to require the land bond for the value of the project to be furnished. Otherwise, there would be no security should the defendant decided not to complete the project or for some reasons the project could not be completed on time. As is the norm in the construction industry if there is a breach by the contractor to complete the project in failing to proceed regularly and diligently, the employer may terminate the contract and call upon the bond.

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[28] Granted as more work was being completed the plaintiff would allow for the value of the land bond to be reduced as was the case when the defendant renegotiated after having stopped work altogether at end of 2002 and that work at that time had only been completed up to 18.27% but even when the plaintiff agreed to reduce the land bond to RM239,050,549.24 being the value of the balance work to be completed, the defendant still could not furnish the land bond.

H

I

[29] Having allowed both the bonds to expire at the incessant imploring by the defendant, there was little the plaintiff could insist on to ensure that the defendant do complete the project. There was no longer the pain that the

A defendant would suffer that comes from the bonds being called upon. On the other hand the exchanged lands sit tightly with the defendant; the exchanged lands having been transferred to the defendant already.

B [30] The defendant tried to shift the blame to the plaintiff by blaming it for not transferring the exchanged lands with the category 'Building' as provided for in the contract. If that change in category of land use from 'Nil' to 'Building' is so crucial the defendant should not have accepted the transfer of the exchanged lands until the change in category of land use. Once the transfer has been effected it is only the registered owner that could apply for change in category of land use.

C [31] However on the ground there was no problem for the defendant to let out the buildings on the exchanged lands and indeed the defendant was collecting rental from the buildings on the exchanged lands.

D [32] It remains the obligation of the defendant to raise the necessary financing to commence and continue to completion the project as provided for under section 3 of the contract as follows:

E Subject to the terms and conditions of this Agreement and in consideration of and in exchange for the obligation of the Government under Article IV of this Agreement, the Company:

- F (a) shall finance the said Project on the said Land in accordance with the terms and conditions of this Agreement;
- F (b) shall at its own cost and expense carry out the Construction and Development Works in accordance with the Design Brief, Detailed Design Concept and Detailed Design Works at no cost or expense to the Government;
- G (c) shall be fully responsible for obtaining all financing required to carry out all its obligations under this Agreement without any recourse to the Government; ...

H [33] In fact the defendant was only too eager to have the exchanged lands transferred to their name and to commence work on 10 October 1997 even when the parties were still in the pre-contract stage. Section 6.1 of the contract required the defendant to furnish a written notice to the plaintiff to take possession of the site and commence work. The project could only commence after both the parties had agreed on the design and material specifications.

I [34] The plaintiff was constrained to issue its letter of 26 June 1998 (Core BOD1 pp 105–106) to suspend the works as the project was still in the pre-contract stage. The plaintiff was required under section 3(b) of the contract to commence work only after the *design brief, detailed design concept dan*

detailed design work have been accepted by the plaintiff. See minutes of meeting dated 1 June 1998 in Core BOD1 at pp 107–116.

A

[35] PW3 testified that the defendant recommenced work on 17 January 2000. As the project could not be completed by the initial completion date of 10 June 2001, an EOT was granted from 17 January 2000–16 January 2003. Monthly site meetings were held from 28 April 2000–27 August 2002 to monitor the physical progress of the project. The schedule of monthly progress (2000–2002) is found in the Core BOD1 at p 117.

B

[36] PW3 explained that site meeting No 27 planned for 4 September 2002 was postponed as there was no physical progress in the works after August 2002. See the minutes at Core BOD1 at pp 120–125. The defendant applied for a second EOT after the expiry of the first EOT on 16 January 2003 but this was rejected by the plaintiff as the reasons were not valid.

C

D

[37] There were many rounds of negotiations from the expiry of the extended completion date on 16 January 2003 till 2006. The defendant informed the plaintiff by their letter of 7 October 2005 that they were obtaining alternative financing as their then financier MBSB had agreed to withdraw from the project and to release the defendant of their obligations provided a new financier that takes over and discharges the defendant of their obligations to MBSB.

E

[38] I was satisfied that the defendant had breached the contract for the reasons given above.

F

Whether the plaintiff had breached the contract such that the termination of the contract was unreasonable and unlawful in the circumstances of the case

G

[39] Section 7.3 of the contract provides as follows:

Subject to Section 3.1(e), the Exchanged land transferred to the Company in accordance with Section 7.2 shall be:

H

- (a) Free from encumbrances;
- (b) Under Registry Title;
- (c) The balance Leasehold tenure; and
- (d) Subject to the 'building' category of land use.

I

[40] The defendant had submitted that the plaintiff's contractual obligations included that the exchanged lands transferred to the defendant must have the category 'Building' in their titles. The defendant said the

A termination of the contract was unlawful for breach of the contract by the plaintiff. There is no merits in this argument.

[41] It goes without saying that only the registered owner of the land could apply to the state authority for any changes in the conditions and category of land use. In fact DW1 agreed to this proposition. Section 124(1)(a) and (c) of the National Land Code ('the NLC') provide as follows:

124 Power of State Authority to vary conditions, etc., on application of proprietor
C (1) The proprietor of any alienated land may apply to the State Authority under this section for —

(a) the alteration of any category of land use to which the land is for the time being subject or, where it is not so subject, for the imposition of any it is not so subject, for the imposition of any category thereon;

D (b) ...

(ba) ...

(c) the amendment of any express condition or restriction in interest endorsed on, or referred to in, the document of title thereto, or the imposition of any new express condition or restriction in interest:

E Provided that the State Authority shall not entertain any such application unless it is satisfied with respect to every person or body having a registered interest in the land, or in occupation of any part thereof under any tenancy exempt from registration, either that he has consented thereto or that his consent ought in the circumstances of the case to be dispensed with: ...
F

[42] The defendant apparently had no problem taking the transfers of the exchanged lands to them without any change of category from 'Nil' to 'Building'. The defendant must be taken to have agreed that they shall apply on their own for any change of category of land use if that is still necessary and relevant to them.
G

[43] The transfer of the exchanged lands was effected on 30 July 1999 and there was a letter dated 18 June 1998 at pp 439–440 PCBOD Vol 3 wherein the defendant had undertaken to surrender the reserved land and building with conditions of approval and development provision by the MPJB for the development of the exchanged land as per the plans certified by the federal land commissioner on 25 April 1998. The defendant also undertook to manage the process of change of conditions and transfer of the exchanged lands. They undertook to resolve the problem arising out of squatters on the exchanged lands. They further agreed to allow the plaintiff to occupy the exchanged lands until the Skudai Army is completed.
H
I

[44] The evidence that was adduced also showed that there were existing

buildings on the exchanged lands which the defendant had let out to tenants upon becoming registered proprietor of the exchanged lands.

A

[45] There was of course the strategic advantage of the exchanged lands in their name as by then no one can prevent them from exercising their rights as a registered proprietor of the exchanged lands which would include letting, leasing, charging and transfer of the exchanged lands.

B

[46] In fact based on the circular issued by the land office there is no prohibition against constructing buildings on lands which category of land use is stated as 'Nil'.

C

[47] There was no evidence adduced that the defendant had applied for change of category of land use from 'Nil' to 'Building'. The fact that the defendant had accepted the transfer of the exchanged lands before the change of category of land use would mean that the defendant had waived this contractual requirement for it is outside the hands of the plaintiff once the exchanged lands are in the name of the defendant.

D

[48] The defendant did not at any material time issue a notice of breach to the plaintiff for what they now say is a breach by the plaintiff of an essential term of the contract. If the defendant had not agreed to them applying for the change in category of land use, then they should have exercised their right under cl 18.1(B)(a)(aa) and give the necessary default notice.

E

F

[49] This court takes cognisance of the circular issued by the PTG Bil 1/2002 which is found at p 137 of PBOA and it states that for town and *pekan* land under registrar title, if there is no category of land use imposed then subject to s 53(3) of the NLC the owner is allowed to construct a building on the land under s 116 of the NLC. In its original language at para 6.2.2 it reads as follows:

G

Bagi tanah bandar atau tanah pekan yang hak milik didaftarkan di bawah hak milik Pendaftar sekiranya tidak ditetapkan syarat kegunaan tanah maka ianya adalah tertakluk kepada seksyen 53(3) KTN iaitu syarat tersirat bahawasanya tanah itu tidak boleh digunakan bagi maksud — maksud pertanian mahupun perindustrian, sebaliknya juga tidak boleh disifatkan termaklum adanya suatu syarat bahawa tanah itu tidak boleh digunakan bagi maksud-maksud bangunan ... pemilik berdaftar sesuatu tanah yang termasuk dalam bidang kuasa seksyen 53(3) boleh mendirikan sesebuah bangunan (bagi mana-mana maksud yang tersebut dalam seksyen 116(4) di atas tanah sedemikian tanpa dikehendaki memohon kepada Pihak Berkuasa Negeri di bawah seksyen 124(1)(a) bagi pengenaan kategori 'bangunan' sebagai kategori penggunaan tanah atau di bawah seksyen 124(1)(c) bagi pengenaan syarat-syarat nyata baru bahawa tanah itu hendaklah digunakan bagi mendirikan bangunan dan jenis spesifik sahaja ...

H

I

- A [50] In any event the court take notice of the evidence adduced that there are buildings on the exchanged lands already as can be seen from the tenancy agreements exhibited in the PCBOD pp 420–428 and further that there are tenants who have intervened in the land reference proceedings in Johor Bahru High Court with respect to an appeal from the decision of the land office with respect to the compensation for the compulsory land acquisition of the exchanged lands by the Johor State Government.
- B

- C [51] It was also argued that the exchanged lands were 37.0185 acres short as these lands had been acquired by the government. However the land search showed the correct size of the exchanged lands as at the date of transfer on 30 July 1999. The official land title search done on 25 May 2011 and even in 2015 for the two pieces of exchanged lands showed the correct description of 382.156 acres as stated in the contract. The definition of the ‘Exchanged Lands’ under the contract is as follows:

- D Exchanged Land means the land held under lease 648 Lot No. 1876, Mukim of Plentong, Daerah Johor Bahru measuring in an area of 125.757 hectares (310.750 acres) and lease 548 Lot No. 139, Mukim of Tebrau, Daerah Johor Bahru measuring in an area of 28.897 hectares (71.406 acres) as per Appendix II.

- E [52] Any acquisition did not come until the relevant *gazette* at p 413 of PCBOD Vol 3 where the Form K was issued on 23 February 2010 and 26 April 2010. At any rate the plaintiff did not receive any compensation for the said acquisition and was not reflected as the entity to receive the compensation sum but rather the defendant.
- F

- G [53] In the absence of evidence from the land office these so called shortfall would in all probability be land used for public access and by the public within the exchanged lands and if at all, it only add to the value of the lands. I find no evidence on the balance of probabilities that there was a shortfall as stated. The defendant would have made their inspection and inquiry before the transfer and would be deemed to have taken the transfer on an ‘as it where is’ basis.

- H [54] There was also the argument of a failure of the plaintiff to obtain a lease of at least 99 years for the exchanged lands but that is not a term of the contract which in fact provided in cl 7.3(c) for the balance leasehold tenure for the exchanged lands as follows: ‘Subject to section 3.1(e), the Exchanged Land transferred to the Company in accordance with section 7.2 shall be: (c) the balance Leasehold tenure’. There was still 53–55 years left for the unexpired lease of the two pieces of exchanged lands.
- I

[55] The defendant also argued that the plaintiff had entered a registrar’s caveat against the exchanged lands on 26 June 2003. However that was entered to protect the plaintiff’s interest after the defendant had failed to renew the

performance bond and the land bond. Without the registrar's caveat on the exchanged lands there was nothing preventing the defendant from disposing them and the plaintiff would be bereft of its security altogether which was supposed to be in the performance bond and the land bond. Under s 320(1)(b)(i) of the NLC the federal government is entitled to apply to the Registrar of Titles to enter a registrar's caveat to protect its interest as follows:

320 Circumstances in which Registrar's caveats may be entered.

(1) Subject to sub-section (2), a *Registrar's caveat may be entered* in respect of any land wherever such appears to the Registrar to be necessary or desirable —

(a) for the prevention of fraud or improper dealing; or

(b) *for protecting the interests of—*

(i) *the Federation or the State Authority, or ...* (Emphasis added.)

[56] The registrar's caveat is a poor alternative to having the performance bond and the land bond which are unconditional on-demand bonds which the plaintiff may call upon after terminating the contract. It is not disputed that the exchanged lands are charged to MBSB for the financing required to complete the project and so in the event of default in the loan the bank would still have priority as a secured creditor and the plaintiff is still an unsecured creditor at most.

[57] The exchanged lands had already been charged to MBSB by then and so it does not affect the defendant's financing and from the tenancy agreements exhibited it also does not prevent the defendant from letting out the buildings on the exchanged lands.

[58] In fact the plaintiff was prepared to give its consent to the registration of bona fide dealings like a fresh charge if it is a case of getting fresh financing. The presence of the registrar's caveat does not in any way mean that the land is not free from encumbrance. The exchanged lands were transferred to the defendant free from all encumbrances. The registrar's caveat entered after the defendant had failed to renew the land bond and the performance bond was to protect the plaintiff's interest.

[59] The fact that the defendant had difficulties raising the necessary financing to finance the construction of the project to completion is none of the plaintiff's fault for the defendant had entered into the contract with their eyes wide open. The defendant was fully aware of their obligations under section 3 of the contract which reads as follows:

A Section 3

Subject to the terms and conditions of this Agreement and in consideration of and in exchange for the obligation of the Government under Article IV of this Agreement, the Company:

- B** (a) shall finance the said Project on the said Land in accordance with the terms and conditions of this Agreement;
- (b) shall at its own cost and expense carry out the Construction and Development Works in accordance with the Design Brief, Detailed Design Concept and Detailed Design Works at no cost or expense to the
- C** Government;
- (c) shall be fully responsible for obtaining all financing required to carry out all its obligations under this Agreement without any recourse to the Government;

- D** [60] If really the defendant had a new financier that was prepared to provide more financing based on the security of the exchanged lands, the plaintiff was more than willing to consent to the charge being created. In fact when the new financing includes the furnishing of the performance bond and the land bonds
- E** by the new bank there would have been no need for the plaintiff to still maintain the registrar's caveat on the exchanged lands.

- [61] The predicament the defendant found themselves to be in is more a case where according a Malay proverb, one blames the dance floor for being uneven
- F** when in fact one cannot dance!

- [62] There is no breach of the contract on the part of the plaintiff having so trustingly transferred the exchanged lands to the defendant and now finding itself with no security in the performance bond and the land bond and waiting with ever fading hope as time marches on with work standing still at 18.27% since December 2002.
- G**

Whether the termination by the plaintiff of the contract was valid and lawful in the circumstances of the case

- H** [63] The defendant had applied for a second EOT from 1 December 2005–31 April 2008 after the first EOT expired on 16 January 2003. Doubtless without an EOT granted, no bank was keen to finance the project further. The defendant was repeatedly asking for time to sort out their financing and to be fair, the plaintiff did bend backwards to accommodate the defendant's request by not issuing any certificate of non-completion ('CNC') until 25 June 2007 stating that liquidated ascertained damages ('LAD') of RM49,119.97 per day for every day of delay from 17 January 2003 shall be charged. The CNC is at the Core BOD at pp 142–3.
- I**

[64] The evidence of PW3 was that the plaintiff was still giving a chance for the defendant to continue the project until 2011. The plaintiff had lost all leverages to negotiate as the bonds has expired and there was no sanction that could be imposed other than hoping that the defendant could some how raise their financing and return to work.

A

[65] That was not to be and with the passage of time with progress of works having come to a standstill around August 2002 more was needed than just positive posturing and persuasive pleas from the defendant. It became patently plain that the defendant was haplessly hoping against hope.

B

C

[66] While waiting and watching would be welcomed for awhile there comes a time when enough is enough. Patience ceases to be a virtue when prompt action is needed to stop the hemorrhage.

D

[67] On 4 March 2011, the plaintiff issued a default notice to the defendant for failure to renew the performance bond and the land bond as well as failure to complete the project by the extended completion date even after the CNC had been issued. See Core BOD1 at pp 144–145. This was followed up with a termination notice dated 11 April 2011. See Core BOD1 at pp 151–154.

E

[68] The plaintiff made an LAD claim of RM49,119.97 per day commencing 17 January 2003–10 May 2011 of 3,036 days amounting to RM149,128,228.92. The notice period as prescribed under section 18.1(A)(a) of the contract for the default notice and the requirement for termination notice under section 18.1(A)(b) have been complied with. Section 18.1 reads as follows:

F

Section 18.1 *EFFECTS OF DETERMINATION*

(A) *Events of Default by the said Company*

G

(a) Save as otherwise provided in this Agreement, if the said Company:

(i) without reasonable cause

...

(cc) fails to complete the said Project within the stipulated period or extended stipulated period;

H

...

(ii) neglects to effect and keep in force the insurance referred to in Article XVII herein;

I

(iii) breaches or fails to comply with or perform any obligation under this Agreement;

...

The Government shall be entitled to give notice in writing (hereinafter

- A referred to as the 'Default Notice') to the said Company specifying the relevant default and require it to remedy the default within thirty (30) days (or such longer period as the Government may agree) from the date of the Default Notice.
- B (b) Termination
If the Government has issued a Default Notice pursuant to the Section hereinabove, and the Company fails to remedy the default specified in such notice within the time stipulated therein, the Government may, for so long as the relevant default or event is continuing, forthwith terminate this Agreement at any time by giving written notice to that effect (hereinafter referred to as the 'Termination Notice') to the Company.
- C
- D [69] The defendant had repeatedly applied for a second EOT to complete the project and the plaintiff wrote on 21 February 2006 that they had no objection to the defendant continuing to completion provided always the defendant procures a fresh land bond as required under the contract. The defendant failed to do so.
- E [70] The plaintiff referred to the case of *Kerajaan Malaysia (Jabatan Kerja Raya) v Global Globe (M) Sdn Bhd* [2019] 1 MLJ 281 at p 300; [2018] 1 LNS 1251 at p 24 paras 57–58 where it was held as follows:
- F Before any extension is granted the defendant must be satisfied that the plaintiff had made progress in carrying out the works and can successfully complete the project ... Under the contract if no extension of time is granted the defendant can, pursuant to cl 51 give notice to the plaintiff to remedy and to terminate if the plaintiff failed to remedy the default.
- G [71] As stated the works had practically come to a standstill by December 2002 with only 18.27% of the physical works had been completed with 81.73% to be completed.
- H [72] From 2006–2011 there was no work done at the site as supported by the photographs of the project in 2011. See the coloured photos on the structural building at the project site in the Core CBOD 1 at pp 157–162.
- I [73] The default notice states four breaches that required remedy:
- (a) failed to complete the project within the time frame set out in section 8.3(a);
- (b) failed to ensure that the performance bond remains valid till the date of the certificate of completion as provided under section 11.2(b);

(c) failed to ensure they the land bond is effective for 12 months after the date of the certificate of completion as provided under section 7.2(c); and A

(d) failed to ensure that the said project was covered by insurance as provided under section 17.3(A). B

[74] The termination notice was only issued after the expiry of the default notice giving the defendant a 30 day period to remedy the breach. The termination notice whilst issued on 11 April 2011 was only made effective on 10 May 2011. C

[75] There is nothing wrong with the default notice and the termination notice, both of which had been validly and lawfully issued under the contract. The termination of the contract by the plaintiff on 10 May 2011 was both valid and lawful. D

Whether the plaintiff had proved the damages arising from the breach of and termination of the contract

[76] The starting point must be the loss of the exchanged lands and parties confirmed that the value should be the reduced sum of RM239,050,549.29. E

[77] Out of this the completed works at the Skudai Army Camp as certified is RM45,347,933 and so after minusing that is RM193,702,616.24 must be resolved by way of the loss suffered by the plaintiff which the plaintiff had proved. F

[78] The plaintiff had also claimed for the loss of the land bond value and the performance bond value of RM256m and RM12.8m respectively. As the purpose of the land bond is to secure the payment of the value of the exchanged lands already transferred to the defendant for which under the contract, the defendant is free to exercise all the rights of exclusive ownership without the need to transfer back the exchanged lands even in the event of default by the defendant, the compensation of the value of the exchanged land less the improvement to the exchanged lands in the form of certified value of works done on the exchanged lands would be a reasonable compensation. G
H

[79] Likewise the performance bond is to secure the completion of the project. The plaintiff could have insisted on calling on the performance bond before it expired but it relented in the face of repeated requests from the defendant not to do so. Had it done so the defendant's financial resources or the lack of it would be severely strangulating. It is not for the defendant to now say I

A that the plaintiff cannot complain because it should have acted tougher and insisted on forfeiting both the land bond and the performance bond.

[80] Be that as it may, now that there is nothing to forfeit the plaintiff must still show and prove what is the loss it has suffered.

B

[81] For that we must address the LAD claim which this court finds is a genuine pre-estimate of the loss for the number of days of delay and in any event it would come within the excepted category of cases where it is difficult to assess loss as there is no known measure of damages employable, the stipulated sum may be recoverable as stated in *Selva Kumar all Murugiah v Thiagarajah all Retnasamy* [1995] 1 MLJ 817 ('*Selva Kumar case*') and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445 ('*Johor Coastal case*').

C

D [82] How is the government to show its loss as a result of delay in the completion of an army camp except that there would invariably be additional costs involved in building new facilities and in roughing out with whatever are the existing current facilities to accommodate the army personnel and their families.

E

[83] The Federal Court has recently in *Cubic Electronics Sdn Bhd v Mars Telecommunications Sdn Bhd* [2018] MLJU 1935 restated the law to allow the court to uphold the LAD clause where the loss per day as agreed is a genuine pre-estimate and not a penalty. The Federal Court held as follows:

F

[65] With respect and for reasons we shall set out below, we are of the view that there is no necessity for proof of actual loss or damage in every case where the innocent party seeks to enforce a damages clause. *Selva Kumar* and *Johor Coastal* should not be interpreted (as what the subsequent decisions since then have done) as imposing a legal straightjacket in which proof of actual loss is the sole conclusive determinant of reasonable compensation. Reasonable compensation is not confined to actual loss, although evidence of that may be a useful starting point.

G

[66] As for our reasons we begin by saying that in view of the legislative history of s 75 of the Act which need not be elaborated in this judgment, we are of the considered opinion that there is nothing objectionable in holding that the concepts of 'legitimate interest' and 'proportionality' as enunciated in *Cavendish* are relevant in deciding what amounts to 'reasonable compensation' as stipulated in s 75 of the Act. Ultimately, the central feature of both the *Cavendish* case and s 75 of the Act is the notion of reasonableness. Indeed, the *Parking Eye v Beavis* [2015] UKSC 67 judgment is replete with instances where the United Kingdom Supreme Court conflated 'proportionality' with 'reasonableness' (see: *Parking Eye* at paras [98], [100], [108], [113] and [193]).

H

I

...

[68] Consequently, regardless of whether the damage is quantifiable or otherwise, it

is incumbent upon the court to adopt a common sense approach by taking into account the legitimate interest which an innocent party may have and the proportionality of a damages clause in determining reasonable compensation. This means that in a straightforward case, reasonable compensation can be deduced by comparing the *amount* that would be payable on breach with the *loss* that might be sustained if indeed the breach occurred. (Emphasis added.) Thus, to derive reasonable compensation there must not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party.

A

B

[69] Notwithstanding the foregoing, it must not be overlooked that s 75 of the Act provides that reasonable compensation must not exceed the amount so named in the contract. Consequently, the impugned clause that the innocent party seeks to uphold would function as a cap on the maximum recoverable amount.

C

[70] We turn now to the issue on burden of proof. *The initial onus lies on the party seeking to enforce a clause under s 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven, subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.*

D

E

[71] If there is a dispute as to what constitutes reasonable compensation, *the burden of proof falls on the defaulting party to show that the damages clause is unreasonable or to demonstrate from available evidence and under such circumstances what comprises reasonable compensation caused by the breach of contract. Failing to discharge that burden, or in the absence of cogent evidence suggesting exorbitance or unconscionability of the agreed damages clause, the parties who have equality of opportunity for understanding and insisting upon their rights must be taken to have freely, deliberately and mutually consented to the contractual clause seeking to pre-allocate damages and hence the compensation stipulated in the contract ought to be upheld.*

F

[72] It bears repeating that the court should be slow to refuse to give effect to a damages clause for contracts which are the result of thorough negotiations made at arm's length between parties who have been properly advised. The court ought to be alive to a defaulting promisor's natural inclination to raise 'unlikely illustrations' in argument to show substantial discrepancies between the sum due under the damages clause and the loss that might be sustained in the unlikely situations proposed by the promisor (see: *Philips Hong Kong Ltd* at p 59) so as to avoid its liability to make compensation pursuant to that clause (see: *Tham, Chee Ho, 'Non-compensatory Remedies', The Law of Contract in Singapore, Ed, Andrew Phang Boon Leong, (Singapore: Academy Publishing, 2012), pp 1645–1862 at p 1654*).

G

H

[73] At any rate, *to insist that the innocent party bears the burden of proof to show that an impugned clause is not excessive would undermine the purpose of having a damages clause in a contract, which is to promote business efficacy and minimize litigation between the parties (see: Scottish Law Commission, Discussion Paper on Penalty Clauses (Discussion Paper No 103), December 1997, paras [5.30]–[5.40]).* (Emphasis added.)

I

- A** [84] The burden is now on the defaulting party to show that the LAD clause and the pre-agreed sum as damages for each day of delay is unreasonable. The defendant had not discharged this burden. Since there was no progress whatsoever from 17 January 2003 to July 2007 the plaintiff was entitled to issue a CNC and serve it on the defendant which it did on 2 July 2007.
- B**
- C** [85] The defendant with the benefit of hindsight is now arguing rather audaciously that the plaintiff should have ignored their repeated pleas to be given a chance to complete the project temporarily stalled for lack of financing which they were optimistic of overcoming and to discern that this was a case of obstinate optimism on their part justifying a quick termination!
- D** [86] I am quite certain if the plaintiff had done that the defendant would argue unashamedly that its conduct to terminate so soon after an early service of the CNC was unreasonable and that for a project of this scope and scale and a privatisation project which is the first of its kind, the defendant should be given some space to prove that it can be workable in a successful public-private collaborative enterprise and that the plaintiff being the government of the day should just be content to charge LAD.
- E**
- F** [87] Either way it smacks of head I win and tail you lose! Having elected to ask for a chance to complete the project through leveraging on whatever contacts they have to prevail even upon the highest decision maker of the executive for this project, they cannot now resile from that position and say with tongue in cheek that the plaintiff should have acted more tough with them! This line of argument is lame and lingers close to being ludicrous and laughable.
- G** [88] Section 75 of the Contracts Act 1950 provides as follows:
- 75 Compensation for breach of contract where penalty stipulated for
- H** When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
- I** [89] The relevant clause on LAD is found in section 16.2(b) of the contract as follows:
- Section 16.2 Extension Period
- ...

- (b) Without prejudice to the Government's right to terminate in the event of the Company's default, unless an extension is granted, the Company shall pay to the Government liquidated and ascertained damages to be calculated from day to day at a rate to be determined per day in accordance with the following formula until the actual Completion Date: A
- $$\frac{\text{BLR} + 1.5\% \times \$B}{365} \times 365$$
- B
- Where –
- \$B – value of the Contract Sum C
- BLR – The rate of interest per annum quoted by Bank Negara prevailing at the time as the indicator rate against which rates of interest are based for loans made in Malaysia.
- [90] The plaintiff had wanted to claim LAD from 17 January 2003 which is a day after the expiry of the EOT 1 until 10 May 2011 which is the date of effective termination. The right to impose LAD would generally be after the service of the CNC for otherwise the defendant would be labouring under the notion that time had become at large upon the expiry of the EOT 1 and thereafter the defendant would have a reasonable within which to complete the project. D
- [91] It is not seriously disputed that the *Bank Negara Malaysia Quarterly Bulletin, Second Quarter 2007* showed the BLR to be 6.72%. The calculation of the LAD is thus as follows: E
- From 2.7.2007 (date of service of CNC) until 10.5.2011 (date of termination)
- Total 1408 days
- $$\frac{6.72\% + 1.5\% \times 239,050,549.24}{365}$$
- F
- = RM 53,835.49 per day
- Total LAD is RM 53,835.49 x 1408 days
- = RM75,800,369.90 G
- [92] Therefore the LAD shall be calculated from the date of service of the CNC which is 2 July 2007 (p 151 CBOD B3(B)) up to the date of termination on 10 May 2011 is RM75,800,369.90. Therefore this LAD shall be added to RM193,702,616.24 thus giving the sum of RM269,502,986.14. H
- [93] Under the contract the plaintiff can claim for the shortfall between the prevailing market value of the exchanged lands and the land bond as at the date I

A of termination. Section 18.1(A)(c)(i)(dd) reads as follows:

(i) the Government shall be entitled to:

...

B (dd) the difference in value, to be determined by the Joint Auditors, between the prevailing market value of the exchanged land in its undeveloped state on the date of termination and the land bond value if any.

C [94] The plaintiff is claiming at para 47 of its submission the sum of RM37.4m. However no evidence had been led as to how this amount is arrived at and under the contract the value is to be determined by the joint auditors. No joint auditors had been appointed by the parties and as at the end of the trial not a scintilla of evidence had been introduced to assist the court in arriving at the amount claimed. This court is not in the business of coming to the aid of any party before it when it had ample opportunity to present its evidence during the trial of both liability and quantum; this was not a bifurcated trial.

E [95] As there was no evidence produced and no witness has testified to this, this court of law cannot award a sum plucked from the air.

[96] In any event this court takes into consideration that the exchanged lands has now been acquired by the Johor State Government.

F [97] The plaintiff had also claimed maintenance costs of RM9,493,807. There is no evidence for this claim and more importantly the plaintiff had been occupying the exchange lands without the need to pay the defendant anything as this is provided for under section 2(c) and section 18.1A(c)(cc)(ii) where the plaintiff is entitled to occupy the exchange lands until the project land is available with its facilities completed for the plaintiff to take possession and occupy.

H [98] Correspondingly the defendant cannot claim for the loss arising from the plaintiff's occupation of their exchanged lands.

[99] Further the plaintiff is claiming RM1.016 billion being the costs of constructing new camps to house the army pending the non-completion of the Skudai Army Camp.

I [100] However the assessment of damages is provided for in section 18.1A(c)(i)(cc) of the contract where the costs that can be claimed is the additional costs incurred in completing the same Skudai Army Camp, though not limited to it. The clause provides as follows:

- (cc) without prejudice to any other rights which the Government might have against the said Company, the Company shall reimburse the Government for any costs and expenses (including any incidental costs and expenses) paid or incurred or reimbursed by the Government after the date of the termination in completing the Project. For the avoidance of doubt, such costs and expenses shall include but not be limited to any additional costs and expenses incurred by the Government in having to complete the said Project in excess of the costs and expenses which would have been incurred by the Company in completing the said Project;
- [101] The plaintiff through PW6 initially attempted to justify the claim for RM1.016 billion by highlighting the costs of construction of the new camps, temporary units and relocation costs, as follows:
- (a) RM175.8m for the Kem Batalion Infantri Standard and the Rumah Keluarga in Batu Pahat;
 - (b) RM116.4m for the construction of Temporary Units in Kem Mahkota Kluang and Kem Ulu Tiram;
 - (c) RM185m for the relocation costs ('kos perpindahan'); and
 - (d) RM538.8m for the camp for the Majidee Camp team (still in planning).
- [102] I agree with learned counsel for the defendant that this claim of the plaintiff cannot be sustained and is not supported by the evidence for the following reasons summarised as follows:
- (a) PW6 admitted that the obligation and responsibility of relocating the teams ('pasukan') is under the plaintiff and not the defendant. There is nothing in the privatisation agreement to suggest otherwise;
 - (b) PW6 himself is not sure how the RM185m claim for relocation cost was derived from;
 - (c) PW6 acknowledged that there is nothing in the privatisation agreement to indicate which teams would be relocated to the Skudai Camp upon completion. Also there is nothing in the agreement to indicate what kind of infrastructures of buildings will be built in the project. The detailed design brief, the detailed design works were not produced. PW6 himself could not explain what exact infrastructures will be built under the Skudai Camp Project;
 - (d) after extensive questioning, PW6 admitted that only the Kem Batalion Infantri Standard and the Rumah Keluarga in Batu Pahat as well as the new camp for Majidee Camp are required to replace the Skudai Camp Project. The temporary units ('unit-unit sementara') are not necessary and it was an error in his witness statement. He also confirmed that there were no construction whatsoever for these so-called temporary units; and

- A (e) PW6 confirmed and admitted that most of the contracts inserted in the common bundle of documents in this suit have nothing to do with the Skudai Camp Project, whether completed or otherwise. These contracts are independent of the project.
- B [103] Since the Skudai Army Camp has not been completed by the plaintiff there is no basis for the court to make a corresponding assessment as no evidence has been adduced as to the additional costs incurred for the different camps that had been built since. The court can only compare like with like and where there is no such comparison, then evidence must be adduced to show the costs difference in constructing an alternative army camp. No effort had been made by the senior federal counsel to adduce evidence on this and surely a court of law must have evidence before it to prove a whopping RM1.061 billion claim! This claim of RM1.061 billion had to be dismissed as having not proved.
- C
- D [104] Arising from this court's finding that the termination was lawful, the defendant's counterclaim had to be correspondingly and consequently dismissed.
- E WHETHER THE PLAINTIFF'S CLAIM IS BARRED BY LIMITATION
- F [105] There is also no merits in the defendant's contention that the plaintiff's claim is barred by limitation. The defendant had contended that this court should take the cause of action as having arisen from the date of extended completion on 16 January 2003. If that be the case limitation would have set in on 16 January 2009 and both the plaintiff's claim and the defendant's counterclaim would have been statute-barred.
- G [106] This argument had been raised before in a precious application by the defendant to strike out the plaintiff's claim on ground of limitation setting in. This court had dismissed the application and the appeal by the defendant was dismissed by the Court of Appeal; hence thus full trial was proceeded with to conclusion. In *Kerajaan Malaysia v KCSB Konsortium Sdn Bhd* [2017] MLJU
- H 2048 with respect to the striking out by the defendant on ground of limitation setting in this court had observed as follows:
- I [33] I am not persuaded by that argument. Here is a case where the parties have modified the date of accrual of the cause of action for LAD. In a construction contract between the employer and contractor there is generally an LAD clause to buffer the harsh effect of termination of the construction contract merely because the contractor has delayed in completing the project by the completion date.
- [34] By not terminating the agreement the employer is affirming the contract and allowing the contractor to complete beyond the completion date or extended

- completion date as in this case subject to a deduction of LAD amount from whatever might be the sums due for the work done during the period after the completion date. A
- [35] Termination would bring in its wake a host of claims for damages, chief of which would be the extra costs and expenses in engaging a new contractor to complete the project. There is also delay occasioned in completing the project arising from terminating the contractor and re-tendering and accepting and appointing the new contractor. As the consequences are severe with the huge financial implication to the contractor, the LAD clause would generally enjoin the Employer to accept the delay of the contractor on payment of LAD. B
- [36] Of course there would be case where after the CNC is issued there is still the continuing breach on the part of the contractor to proceed with the works regularly and diligently such that there is no reasonable likelihood of the contractor completing the project in the near foreseeable future without the employer incurring too much losses to their clients or to the people as in a government project in this case. C D
- [37] The employer would in such a situation have to make the difficult decision to terminate and sue for damages.
- [38] The LAD clause in the present case is not materially different from that in the *Loh Wai Lian's* case. Whilst the plaintiff here has an indisputable right to terminate for the defendant's default in completing by the completion date, that right need not be exercised and the plaintiff may contractually elect to affirm the contract and claim LAD and only when it is abundantly clear that the defendant is in no position to realistically complete the works that it may then elect to terminate the contract and sue for all damages arising out of the breach. E F
- [39] In fact if the employer were to immediately terminate upon the completion date being up and the works remained uncompleted, such a termination might well be unlawful and unconscionable as has been held in some of the cases that shall be referred to below. G
- [107] Apparently the defendant was quite happy and resigned to accepting that reality with equanimity! Ostensibly it is on the high pedestal of upholding the hallowed principle that the court should not entertain stale claims barred by the statute of limitation. Obviously below the thin veneer of respectability is the realisation that the counterclaim would be much less than the plaintiff's claim or that the defendant's counterclaim would be difficult if not impossible to sustain and prove. H
- [108] It certainly does not make sense for counsel to mount an argument that would defeat and more than that, destroy his client's counterclaim completely. To put it euphemistically it is more a strategy to avoid further losses seeing that the exchanged lands sit snugly and solidly with the defendant as their registered owner and that they would in all probability have appreciated in value. Even I

- A though the exchanged lands have been compulsorily acquired the defendant would surely rely on the principle of fair compensation for land compulsorily acquired.
- B [109] In *Kerajaan Malaysia v KCSB Konsortium Sdn Bhd* [2017] MLJU 2048 where the judgment rendered for the striking out action by the defendant had been reported, this court had observed as follows:
- C [50] Whether or not the plaintiff would be able to succeed is for them to prove at the trial but I cannot say in all certainty that the cause of action for the LAD had accrued on 17 January 2003. I am more inclined to the view that it is generally claimable from the date of issuance of CNC and in this case on 25 June 2007 to date of termination on 10 May 2011 in which case the cause of action only accrued on 11 April 2011 such that this suit filed on 7 April 2017 was well within the six years limitation period.
- D [51] The defendant also argued that alternatively the CNC in itself is evident that any allegation of breach and with that the commencement of the plaintiff's cause of action against the defendant would have arisen at the very latest on the date the said CNC was issued ie 25 June 2007. Therefore, according to learned counsel for the defendant, even if we were to calculate the six years limitation period since 25 June 2007 the plaintiff's claim would have been time-barred since 25 June 2013.
- E [52] However that is not the purpose served by a CNC. Generally a CNC is issued to prevent time from being at large after the completion date has set in and to justify a claim for LAD.
- F [53] It had not been argued that time for completion became at large after the expiry of the extended completion date of 17 January 2003 before the CNC was issued on 25 June 2007. For the sake of argument, even if it had been raised, it is still a matter to be determined at trial whether more than a reasonable time had passed having reference to whether the parties were still negotiating and exploring the roadmap forward and whether the defendant here was still prevailing upon the plaintiff for further extension of time. Even if the reasonable time for completion is before the CNC was issued, it is still the call of the plaintiff whether and when to issue the CNC or for that matter the notice of termination is to be issued with the defendant as contractor having the right always to terminate the contract or to repudiate it to cut its own losses.
- G
- H [54] As submitted by the senior federal counsel for the plaintiff and as admitted by learned counsel for the defendant, there were negotiations between the parties for a further extension of time to complete the project (after the extension to 17 January 2003 had lapsed). The plaintiff had issued a letter to the defendant dated 21 February 2006 giving conditional extension of time to complete the project.
- I [55] Such extension would have enabled the defendant to complete the project latest by 21 February 2009 if one were to take into account the maximum period of 36 months from 21 February 2006.
- [56] Nevertheless, such extension of time never materialised as the condition could not be satisfied at that time. Learned counsel for the defendant then submitted that,

- be that as it may, even if there was such an extension of time given, it would have lapsed by 21 February 2009 and by then, it is not disputed that the project was not yet completed. A
- [57] Learned counsel for the defendant then postulated that, even if we were to calculate the six years limitation period from 21 February 2009, the plaintiff's claim against the defendant would be barred by limitation since 21 February 2015. B
- [58] The answer to that is that it is not for the defendant to dictate when the plaintiff should give the necessary default notice and notice to terminate under the privatisation agreement. The ball is at the feet of the plaintiff as the employer and if it is the plaintiff who had been in breach, then surely the defendant is at liberty to terminate the agreement earlier. C
- [110] After hearing the full evidence of the parties at the trial I was more than fortified that this is a case where upon a breach by the defendant to complete the project by 26 January 2003 the plaintiff had allowed the defendant, following their many persuasive and spirited requests to time to continue with the project and it was only upon termination on 11 April 2011 that the cause of action had properly arisen. D
- [111] The effect of the consent judgment of 17 May 2016 is that clearly from date of termination which is 11 April 2011, time shall not begin to run until 17 June 2017. Either way whether with or without the benefit of parties agreeing to time not running from 11 April 2011–17 June 2017, this writ was filed on 7 April 2017 which was before 11 April 2017, the date limitation would have set in without the moratorium until 17 June 2017. E F
- [112] Therefore even without reference to the period of stay of limitation agreed by consent in the consent judgment recorded, the plaintiff was well within the period of six years when it refilled its claim on 7 April 2017 G
- PRONOUNCEMENT
- [113] Therefore overall the plaintiff was entitled to RM269,502,986.14 for which I allowed judgment to be entered against the defendant. This shall carry interest at 5%pa from date of the statement of claim to realisation. The entire counterclaim of the defendant was dismissed. H
- [114] Both parties agreed that save for the agreement on the suspension of limitation, the other terms of the consent judgment recorded on 17 May 2016 had been superseded by the Johor State acquisition of the exchanged lands and can no longer be binding on the parties. I
- [115] After hearing the parties on costs this court had allowed costs of RM80,000 to be paid by the defendant to the plaintiff.

A [116] The learned senior federal counsel graciously agreed that if the plaintiff is proceeding with any modes of execution including winding up of the defendant, they shall first give a 21-day notice to the defendant.

B *The plaintiff's claim allowed, and the defendant's counterclaim dismissed with costs of RM80,000.*

Reported by Mohd Kamarul Anwar

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